

**UNITED STATE DISTRICT COURT
FOR THE
DISTRICT OF VERMONT**

UNITED STATE OF AMERICA)	
)	
v.)	No. 5:2001-CR-00012
)	
DONALD FELL)	

**MOTION TO STRIKE THE NOTICE OF INTENT TO SEEK THE DEATH
PENALTY FOR THE REASON THAT THE FEDERAL DEATH PENALTY ACT
IS UNCONSTITUTIONAL BASED UPON THE SUPREME COURT’S DECISION
IN *RING* AND THE FIFTH AND EIGHT AMENDMENTS TO THE
CONSTITUTION**

Now Comes Donald Fell, through his undersigned counsel and moves this Honorable court for an order striking notice of intent to seek the death penalty filed in this case for the reason that the Federal Death Penalty Act (FDPA) is unconstitutional pursuant to the Supreme Court’s decision in *Ring v. Arizona*, 536 U.S. 584 (2002) and the Fifth, and Eighth Amendments.

The Supreme Court’s *Ring* decision has rendered the federal death penalty unconstitutional as there is no legislatively approved process for alleging aggravating factors that comports with the constitution. The act may not be saved by a judicial “construction” that creates a new criminal offense whose elements and intertwined procedures have neither been considered, nor enacted into law, by congress.

Even if the FDPA can be rendered constitutional by a finding by the grand jury of gateway and statutory aggravating factors, the “special findings” in the indictment should be stricken and the death notice should be dismissed because the government has not obtained an indictment consistent with the requirements of the Fifth amendment. In this case, the Superseding Indictment contains 8 “special findings.” Superseding Indictment (7/8/2002) (Doc.

57). Nowhere, however, does the indictment state that the “special findings” would subject Mr. Fell to the death penalty or otherwise reveal that the grand jury intended to return an indictment charging a capital offense.

Moreover, the FPDA fails to provide a structure which permits jurors to make a reasoned choice between a sentence of life in prison without the possibility of release, and execution. The FDPA has created a scheme that mixes concepts, burdens of proof, and an overall process which is likely incomprehensible to jurors. The constitutional infirmities in the process support the defendant’s position that the Notice of Intent filed herein, must be struck.

WHEREFORE, for the reasons described in greater detail in the accompanying Memorandum, Mr. Fell respectfully requests this Court to strike the death notice in this case.

Dated at Corinth, Vermont, this 16th day of November, 2015.

Respectfully Submitted,

MICHAEL N. BURT
KERRY B. DeWOLFE
JOHN T. PHILIPSBORN

By: /s/ Kerry B. Dewolfe

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2015, I electronically filed with the Clerk of

Court the following document(s): **MOTION TO STRIKE THE NOTICE OF INTENT TO SEEK THE DEATH PENALTY FOR THE REASON THAT THE FEDERAL DEATH PENALTY ACT IS UNCONSTITUTIONAL BASED UPON THE SUPREME COURT'S DECISION IN *RING* AND THE FIFTH AND EIGHT AMENDMENTS TO THE CONSTITUTION**

using the CM/ECF system. The CM/ECF system will provide service of such filing(s)

via Notice of Electronic Filing (NEF) to the following NEF parties:

Michael N. Burt, Esq.
Kerry B. DeWolfe, Esq.
William B. Darrow, Esq., Assistant United States Attorney
Bruce R. Hegyi, U.S. Dept. Of Justice

I also caused to be served, by U.S. Postal Service, the following non-NEF party:

Donald Fell
Register Number 05306-010
The Metropolitan Detention Center
P.O. Box 329002
Brooklyn, NY 11232

Dated at Corinth, Vermont, this 16th day of November, 2015.

By: /s/ Kerry B. DeWolfe

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